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No. 87-1938

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION, PETITIONER

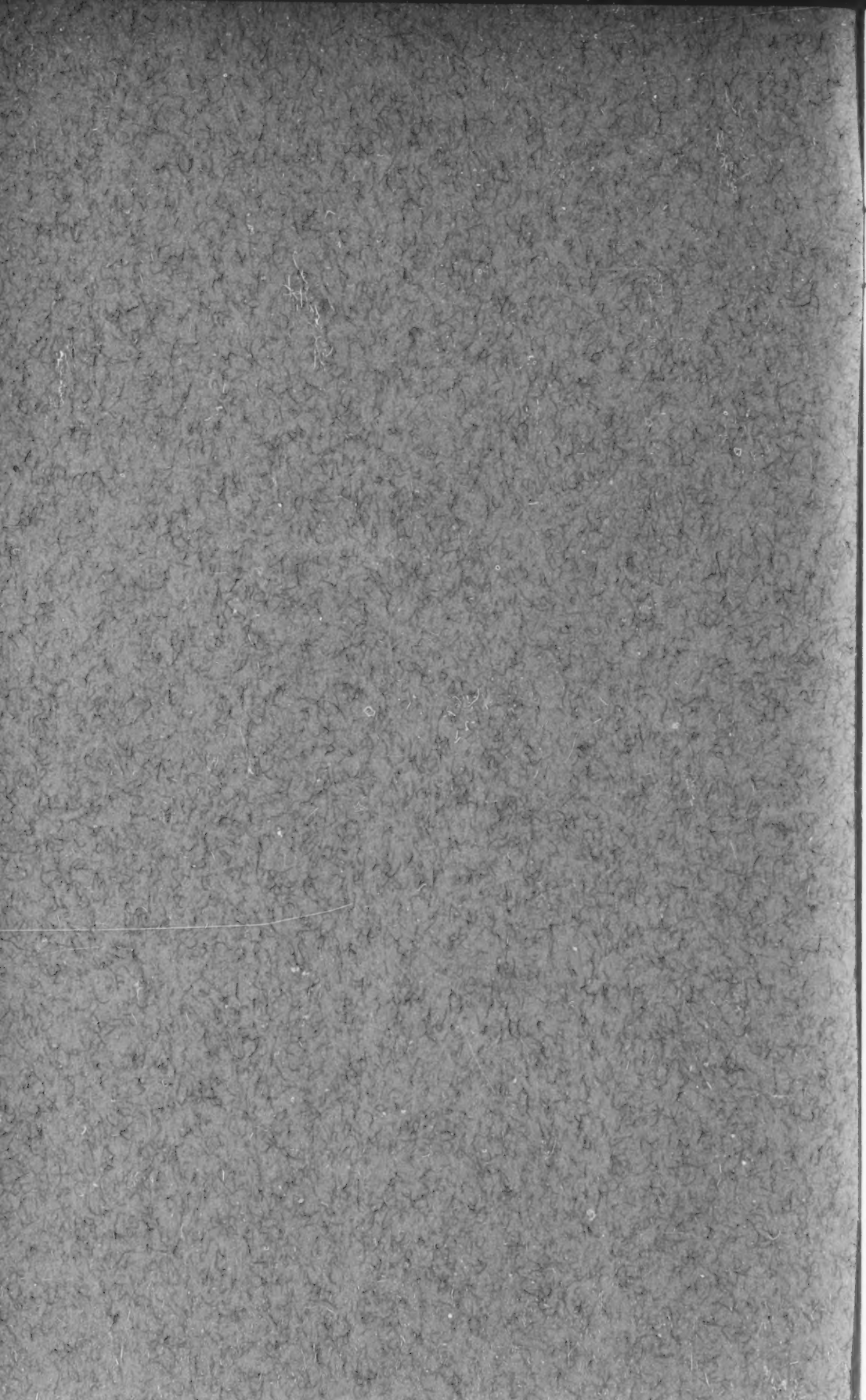
v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in refusing to enjoin a state proceeding involving shipping operations that the Interstate Commerce Commission (ICC) has determined to be interstate transportation subject to the ICC's, rather than the state's, regulatory jurisdiction.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 837 F.2d 184.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1988. A petition for rehearing was denied on March 8, 1988 (Pet. App. 7a). The petition for a writ of certiorari was filed on May 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

E&B Carpet Mills, a division of Armstrong World Industries (Armstrong), manufactures carpet at its Dalton, Georgia facility and ships it by motor carrier to a service center at Arlington, Texas, where it is stored pending delivery to retail outlets located primarily in Texas. E&B

uses various carriers, including Reeves Transportation Company (Reeves), to transport carpet from Dalton to Arlington. It also employs Reeves (as well as other carriers) to ship carpet from Arlington to other points in Texas, including carpet that other carriers have transported from Dalton to Arlington. Pet. App. 2a, 15a-17a.

This case arises out of a dispute over whether the motor carriage from Arlington to other points in Texas is interstate transportation subject to exclusive ICC authority (see 49 U.S.C. 10521(a)(1)(A)) or intrastate transportation subject to state regulation (see 49 U.S.C. 10521(b)(1)). The State of Texas began an investigation of the shipments in 1985. Shortly thereafter, Armstrong and Reeves petitioned the ICC for a declaratory ruling that the carpet shipments were part of a continuous movement of goods in interstate commerce and therefore outside the state's regulatory authority. While the matter was pending before the ICC, Texas brought a state enforcement action alleging that carpet shipped from Dalton to Arlington without a "sidemark" indicating the ultimate Texas destination becomes intrastate commerce, subject to state regulation, when it is subsequently shipped from Arlington to other points in Texas. The state also intervened in the ICC proceeding and requested that the ICC postpone action pending the outcome of the state court suit. The ICC denied that request. Pet. App. 2a, 12a-13a.

The ICC ruled that the shipments from Arlington to other points in Texas were interstate and were thus within its exclusive regulatory jurisdiction (Pet. App. 12a-31a). Armstrong, joined by the ICC, then requested the United States District Court for the Western District of Texas to issue a preliminary injunction barring the Texas state court proceeding. The district court denied that request,

holding that the plaintiffs had failed to establish irreparable injury (*id.* at 48a-50a).¹ Texas's request to the ICC to reconsider its declaratory order was denied (*id.* at 32a-47a).

In October 1987, Texas filed a petition in the United States Court of Appeals for the Fifth Circuit for review, pursuant to the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (also known as the Hobbs Act), of the ICC's determination that the shipments were interstate. Shortly thereafter, the ICC filed a motion with the court of appeals requesting that it enjoin the state court proceeding pending review of the ICC's order.² The ICC claimed that the court of appeals has authority to issue such an injunction under the All Writs Act, 28 U.S.C. 1651.³

The court of appeals denied the ICC's request for a preliminary injunction (Pet. App. 1a-6a). The court first observed that the All Writs Act empowers it "to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels" (*id.* at 3a, quoting *FTC v.*

¹ None of the plaintiffs appealed that decision; however, the ICC later filed a new request for injunctive relief, which is still pending before that court (Pet. App. 2a-3a).

² The question precipitating Hobbs Act review of the agency order—namely, whether the ICC correctly determined that the shipments are interstate rather than intrastate—has been briefed and oral argument has been set for the week of September 5, 1988. The United States defended the ICC's position that the shipments involved here were interstate in nature; however the United States did not join in the ICC's motion to enjoin the state court proceeding.

³ The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" (28 U.S.C. 1651(a)).

Dean Foods Co., 384 U.S. 597, 604 (1966)). It further noted, however, that "federal courts are to be cautious about infringing on the legitimate exercise of state judicial power" (Pet. App. 4a) and that "[i]t is difficult to see why an injunction is necessary to preserve our jurisdiction over th[is] case" (*ibid.*). As the court explained, "the state court does not have the power to review the ICC's order for error and the state court's interpretation obviously has no binding effect on our decision" (*ibid.*); instead, "the ICC seeks this injunction because it believes the enforcement proceeding interferes with its own jurisdiction, not ours" (*ibid.*). The court of appeals refused "to issue an injunction beyond that necessary to protect our own jurisdiction" (*id.* at 5a-6a) and accordingly denied the ICC's motion (*id.* at 6a).⁴ The state court subsequently held that the shipments at issue here were intrastate rather than interstate and enjoined Armstrong and Reeves from conducting further shipments without first obtaining appropriate permits from the state regulatory agency (*id.* at 51a-53a).

ARGUMENT

The ICC petitions for a writ of certiorari to review the court of appeals' interlocutory order, entered in the course of a Hobbs Act proceeding, refusing to enjoin Texas's state court action against Armstrong and Reeves. As a threshold matter, the ICC has no statutory authority to file a petition for a writ of certiorari from the court of

⁴ The ICC filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied the petition for rehearing (Pet. App. 7a). The clerk of the court returned, without filing, the suggestion for rehearing en banc "with the advice that the Court will not consider petitions for rehearing en banc of non-dispositive orders" (*id.* at 8a).

appeals' order; thus, the petition should be dismissed for lack of jurisdiction. In any event, the petition does not present an issue warranting this Court's review.

1. Since 1975, ICC orders have been subject to judicial review pursuant to the Hobbs Act, 28 U.S.C. 2341 *et seq.*⁵ An aggrieved party commences the action by filing a petition in the court of appeals against the United States (28 U.S.C. 2344, 2347). The Hobbs Act then vests responsibility for defense of the suit in the Attorney General, who "is responsible for and has control of the interests of the Government in all court proceedings" (28 U.S.C. 2348). However, Congress has further provided that an agency subject to the Hobbs Act may also participate in the proceeding to defend its order (*ibid.*).⁶ In addition,

⁵ Prior to 1975, ICC orders were subject to enforcement and review under the Urgent Deficiencies Act of 1913, ch. 32, 38 Stat. 219. See 28 U.S.C. (1970 ed.) 1336, 2321-2325. That Act empowered the district courts to enforce and review ICC orders and further provided that an action to enjoin an ICC order had to be heard before a three-judge panel and could be appealed directly to this Court (28 U.S.C. (1970 ed.) 2325). In 1975, Congress substantially revised those provisions, preserving the district court's jurisdiction to enforce ICC orders, eliminating judicial review by three-judge district courts, and vesting the courts of appeals with exclusive jurisdiction to review ICC orders in accordance with the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, which is more commonly known as the Hobbs Act. See Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917. See also H.R. Rep. 93-1569, 93d Cong., 1st Sess. 19-23 (1974) (indicating the relevant statutory revisions). The Hobbs Act procedures also control judicial review of certain final orders of the Federal Communication Commission, the Secretary of Agriculture and the Nuclear Regulatory Commission, and certain rules, regulations, and orders of the Secretary of Transportation and the Federal Maritime Commission (28 U.S.C. (& Supp. IV) 2342).

⁶ Section 2348 states:

The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency

Congress has provided that, in contrast to most other proceedings in which the United States is interested, "[t]he United States, the agency, or an aggrieved party may file a petition for a writ of certiorari" (28 U.S.C. 2350).⁷

Congress, through 28 U.S.C. 2350, has thus given the ICC a limited statutory authorization to file a petition for a writ of certiorari in Hobbs Act proceedings. But that authorization is strictly circumscribed by Section 2350's carefully drawn terms. Section 2350 permits a petition *only* from: (1) an interlocutory order of the court of appeals granting or denying an injunction of an agency order; or (2) a final judgment of the court of appeals on review of the agency order.⁸ The ICC (or for that matter the United States or an aggrieved party) may not file a petition to review a court of appeals decision pursuant to 28 U.S.C. 2350 except from one of these two types of orders. The court of appeals' order in this case clearly

is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order.

* * *

Thus, Congress has made a limited departure in Hobbs Act proceedings from the general rule that the Attorney General and his designees have exclusive authority to represent the federal government's interests in court. See 28 U.S.C. 515-519.

⁷ This Hobbs Act provision represents a limited departure from the general rule, set forth in 28 U.S.C. 518(a), that the Attorney General and the Solicitor General shall have exclusive authority to represent the federal government's interests in this Court. See generally *United States v. Providence Journal Co.*, No. 87-65 (May 2, 1988).

⁸ Section 2350(a) specifically provides:

An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. * * *

does not fit into either category. The order did not grant or deny an injunction of the ICC's declaratory order, it denied the ICC's request, under the All Writs Act, for an injunction of a state court proceeding; and the order was not a final judgment of the court of appeals on review of the ICC's declaratory order, it was purely interlocutory. Because the instant order does not fall within the terms of 28 U.S.C. 2350, and because Congress has not given the ICC independent litigating authority before this Court in any other circumstance, the ICC's petition for a writ of certiorari in this case should be dismissed for lack of jurisdiction. See *United States v. Providence Journal Co.*, No. 87-65 (May 2, 1988).⁹

2. Apart from the jurisdictional impediment, the ICC petition does not present a question warranting this Court's review. The only question presented at this time

⁹ The ICC contends (Pet. 1 n.1) that 28 U.S.C. 2323 and 2348 authorize the filing of its petition in this case. But those two provisions, by their terms, simply authorize the ICC and other interested entities to "appear as parties" in district court actions to enforce ICC orders (28 U.S.C. 2323) and—as noted above—in Hobbs Act actions to review ICC orders (28 U.S.C. 2348). They do not overcome the specific and express limitations on Supreme Court review set forth in their sister provision, 28 U.S.C. 2350. It is, of course, safe to assume that Congress did not intend "to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). If Sections 2323 and 2348 were read as the ICC apparently urges, they would render Section 2350's limitations completely meaningless. The ICC's reliance (Pet. 2 n.1) on a law review article (Stern, "Inconsistency" in *Government Litigation*, 64 Harv. L. Rev. 759 (1951)), which this Court cited for illustrative purposes in *Providence Journal Co.* (slip op. 11-12 n.9), is also misplaced. The article, which was written nearly 40 years ago, addresses judicial review of ICC orders under the Urgent Deficiencies Act of 1913 (see note 5, *supra*). It does not address the ICC's authority to seek Supreme Court review of collateral court orders of the type involved here.

is whether the court of appeals abused its discretion in refusing to enjoin a state court proceeding. That refusal does not reflect clear error, nor does it implicate a matter of great consequence. Moreover, as the court of appeals noted, the ICC may follow other avenues to obtain the relief it seeks.

As an initial matter, the United States agrees that once the ICC commenced an administrative proceeding to determine whether the shipments at issue here were interstate transportation subject to the ICC's jurisdiction, Texas should have dismissed its state court enforcement action against Armstrong and Reeves or held it in abeyance pending the ICC's decision. As this Court explained in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), interpretations of this character should be made in the first instance by the agency "upon whom the Congress has placed the responsibility of action" (*id.* at 177). The ICC proceeding is the preferable forum for resolving the dispute because "the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved" (*id.* at 179). If the state is unsatisfied with the ICC's determination, it can seek judicial review, as Texas has done here, under the Hobbs Act.

That being said, however, the United States cannot also say that the court of appeals clearly abused its discretion in refusing the ICC's request under the All Writs Act to enjoin Texas's state court enforcement action against Armstrong and Reeves. We have no doubt that the court of appeals *may* provide such relief in this situation. Upon motion by an appropriate party,⁹ the federal court could

⁹ As previously noted, it is the Attorney General, rather than the ICC, who "is responsible for and has control of the interests of the Government in all court proceedings under this chapter" (28 U.S.C. 2348). We do not address in this case whether the Attorney General,

reasonably conclude that an injunction of the state court proceedings would be "appropriate in aid of [its] jurisdiction []" (28 U.S.C. 1651(a)). The injunction would, for example, preserve the status quo in light of the ICC's presumptively correct order. See *Dean Foods Co.*, 384 U.S. at 604. In addition, the requested injunction would be "agreeable to the usages and principles of law" (28 U.S.C. 1651(a)), particularly in light of this Court's decision in *Service Storage & Transfer Co.*, which gives the ICC primary jurisdiction over the matter in issue. But the federal court's ultimate decision whether to exercise its powers under the All Writs Act in this situation rests largely with the court's informed judgment and discretion. See, e.g., *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403 (1976). The court observed here that the injunction is not "necessary to preserve our jurisdiction over the case" (Pet. App. 4a). While that is not a necessary precondition for the requested injunction, it is a substantial basis under the circumstances to justify the denial of discretionary injunctive relief.

In addition, the denial of injunctive relief here is not a matter of such great consequence that it demands this Court's immediate attention. The decision has limited precedential effect in light of the highly discretionary nature of the requested remedy. The denial of relief works the most immediate hardship upon the shipper and the carrier. Those parties, however, neither requested an in-

rather than the agency, is the proper party to determine whether to seek an injunction against a pending state court proceeding in order to protect the ICC's primary jurisdiction as recognized in *Service Storage & Transfer Co.* We simply note that the United States clearly can seek such an injunction in appropriate circumstances. See *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225-226 (1957). See also *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142-148 (1971) (holding that the NLRB may bring an action to enjoin a state court proceeding).

junction in the court of appeals nor petitioned for a writ of certiorari in this Court (although they have supported the ICC's petition). Moreover, the ICC, the shipper, and the carrier are not without other remedies. They can request the Texas appellate courts to enforce this Court's holding in *Service Storage & Transfer Co.* And as provided by 28 U.S.C. 1336(a) and 28 U.S.C. 2321(b), they can bring an appropriate action in federal district court to enforce the ICC's declaratory order. In fact, the ICC has pending a request for injunctive relief before the district court (see note 1, *supra*). Finally, if the court of appeals affirms the ICC's order, the parties can initiate a new request for an injunction, either in that court or in the district court, to effectuate the court of appeals' ruling.

CONCLUSION

The petition for a writ of certiorari should be dismissed.
Respectfully submitted.

CHARLES FRIED
Solicitor General

AUGUST 1988

